No. 06-529

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In The

Supreme Court of the United States

DOROTHY JONES, as personal representative of the estate of Denise Michelle Jones, deceased,

Petitioner,

v.

WILLIAM KISH, III; Joseph Lavis; Douglas Muncey; and Mohamed Nasser,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

I. There are several compelling reasons to review.

The police officers overlook several compelling reasons to review this case. In addition to the conflict among the federal circuits, this Court is urged to accept this Petition and intervene because the identical companion case of Rodney Ricks and Eric Draw against these police officers is currently pending in the Sixth Circuit, Case #06-1959. The Sixth Circuit rules of court require the Sixth Circuit to apply the decision of the present case, as binding precedent, if this court does not intervene and overrule the conflicting legal decision:

> **"6 Cir. I.O.P. 206(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court."**

Petitioner's published matter was rejected by the Sixth Circuit's en banc court. The Sixth Circuit has long adhered to the "venerable principle" that a prior published decision remains controlling ***unless*** overturned by an *inconsistent* decision of the United States Supreme Court **or** by the Sixth Circuit itself sitting en banc. *Schoenberger v. Russell*, 290 F.3d 831, 841 (6th Cir. 2002); *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996); 6th Cir. R. 206(c). This Court should exercise its supervisory power and responsibility to intervene to resolve the conflict among the circuits. Moreover, Petitioner will not have a proper proceeding for redress as required by 42 U.S.C. § 1983:

> **"Every person who, *'under color of'* any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights*, privileges, or immunities *secured by the Constitution and laws, shall be liable to the party***

injured in an action at law, suit in equity, or other proper proceeding for redress."

The important legal issues presented here emanate from the plain language of § 1983. The officers ignore the plain language. This Court's decision in *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), did not and cannot change or abrogate the plain meaning of the statute. Petitioner is improperly without a state remedy since her state law claims were dismissed on State law grounds, *cf. Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984). Indeed, in *Monroe v. Pape*, 365 U.S. 167 (1961), Justice Douglas identified the purposes of § 1983 as: **(1) overriding certain kinds of state law; (2) providing a remedy was inadequate; *and* (3) providing a federal remedy where the state remedy, though adequate in theory, was not available in practice.** Justice Douglas then concluded that "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id. at 183.* State law is not a defense to claims brought against governmental agencies or officers under federal civil rights statutes. *Martinez v. California*, 444 U.S. 277, 285 n.11 (1980); *Rushing v. Wayne County*, 436 Mich. 247, 462 N.W.2d 23 (1990). The Sixth Circuit's legal rule that assumption of risk is a defense to criminal conduct in a § 1983 claim is first impression. Petitioner requests review because she was deprived of her mandated remedy under § 1983 to redress her guaranteed constitutional right to life and bodily integrity.

II. The Sixth Circuit's conflict with other federal circuits warrants Supreme Court review to resolve whether words and presence of police officers facilitating illegal drag race and felony gambling is sufficient to constitute affirmative state action.

The officers incorrectly assert that the Sixth Circuit did not properly apply its "danger creation exception." *Res. App. 10.* The applicability of a legal doctrine is a question of law that this court reviews de novo. *People v. Thousand*, 465 Mich. 149, 156, 631 N.W.2d 694 (2001); *First Option of Chicago v. Kaplan*, 514 U.S. 938 (1995). Further, nowhere does § 1983, this Court's prior decisions, or the Fourteenth Amendment

authorize the "state created danger doctrine." This Court should review the legal effect of the state created danger doctrine to the circumstances of this case. The officers cite one paragraph in the petitioner's complaint to *falsely* suggest that this is a failure to protect claim, *but cannot cite any argument in the courts below* in support. Rather, petitioner pointedly argued she has not claimed the officers failed to stop the illegal drag race. Appellees stipulated to the facts presented here. *Ct. App. Reply Brief p. 1.* Further, the officers' candor is disturbing because material paragraphs of the complaint were argued below – "Officers . . . purposefully drove their police vehicles into a local party store parking lot so as to use their vehicles to facilitate, incite, and encourage the drag race and did so in the manner stated herein." *Ct. App. JA p. 244 ¶ 27.* Petitioner's complaint also states the officers "facilitated and encouraged the drag race by telling the organizers and participants to continue with the drag race because they were not there to arrest anyone." *Ct. App. JA p. 247 ¶¶ 44 & 45.* And, the "Officers . . . became participants of the drag race by telling the drag racers to proceed." *Ct. App. JA p. 349 ¶ 56.* Further, the Petitioner does not claim any liability or rights through the Michigan criminal drag race (MCLA 257.626a) and gambling (18 U.S.C. 1950) statutes, except to show the officers actions were illegal. Moreover, Petitioner's complaint stated "officers . . . exercised their authority as police officers to deprive the decedent of her fundamental right to life and liberty as described by the above acts and omissions of the defendants. This deprivation violated the decedent's rights under . . . Fourteenth Amendment of the United States Constitution." *Ct. App. JA p. 252.* Contrary to the police officers' assertion in a § 1983 action, the petitioner must prove that the official acted 'under color of law' and caused an injury to his constitutional or federal rights. *Monroe v. Pape*, 365 U.S. 167 (1961). *Petitioner's Sixth Circuit brief and en banc request urged the lower court to apply the plain language of* § 1983 to eliminate the conflict among the *Federal Circuits. Please see Ct. App. Appellant's Brief p. 12-15. – "The statutory language of 42 U.S.C. section 1983 provides a remedy to redress a deprivation of federal rights which takes place 'under color of' state, local, territorial, or District of Columbia law. A*

police ... ver acts under color of law even though in the course of his duties, he violates the law." Citing Monroe, supra. Respondents are being disingenuous about the history and arguments of this case to thwart the necessary conflict review. Indeed, there is no dispute about the facts. *Pet. App. at 15 and Pet. App. 24.* The officers conveniently overlook the Sixth Circuit's conflicting legal decision – "[B]ecause Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law." *Pet. App. 19-20.* The Fourteenth Amendment did not just place a restraint on the States' power to physically act. It would be illogical to limit the restraint on the States' power to affirmatively act to unlawful physical or written manifestations. After all States issue verbal and written orders which affect the rights of People. The Fourteenth Amendment stripped the States of all power to deprive any person of life, liberty or property by arbitrary or oppressive action – such action is never due process of law. Nowhere does the Fourteenth Amendment limit the restraint on physical or written action. Indeed, Courts routinely find through application of the Fourteenth Amendment written words in legislation unconstitutional.

III. Settling the dispute among the federal circuits.

A. The Sixth Circuit's decision conflicts with the Second, Fourth and Ninth Circuits that words and presence constitute affirmative state action.

Sadly, the officers incorrectly distinguish the conflicting decisions of the Second, Fourth and Ninth Circuits by misstating the Petitioner's claim is only based on "respondents' presence at the scene of the drag race." *Res. p. 17.* Officers facilitated and encouraged illegal drag racing and gambling that killed Jones. In the courts below the officers stipulated to Petitioner's facts. *Ct. App. JA 1448.* Judicial admissions are binding on the parties for purposes of the case, including appeals. *Ferguson v. Neighborhood Housing Services of Cleveland, Inc.*, 780 F.2d 551 (6th Cir. 1986). Furthermore, contrary to the officers' assertion, the high school coach in *Meeker* did not [employ] a private party. *Res. p. 17.* Rather,

Meeker v. Edmundson, 415 F.3d 317 (4th Cir. 2005), held that words by a high school coach that initiated and encouraged repeat beating of student by other members of wrestling team constituted state action. The *Meeker* Court stated – "Moreover, it is crystal clear that *if* Meeker can prove, as he alleges, that Coach *Edmundson "instituted, permitted, endorsed, encouraged, [and] facilitated"* the beatings, *Edmundson* ***cannot*** *escape liability simply because he did not administer the beatings with his own hands."* (emphasis added). Meeker *at 322*. Like *Meeker* the respondents acting in the capacity of law enforcement officers facilitating and encouraging the very crimes that killed Jones, should not be allowed to escape liability simply because they were not driving the drag race vehicle themselves.

The police officers omit that they augmented the decision of Aaron Reynolds to call off the illegal drag race. The officers told Mr. Reynolds, the driver of the illegal drag race vehicle that struck and killed Jones that they "were not there to arrest anyone and go ahead with the race." Officer Nasser placed an illegal wager on the drag race. Similarly, *Kennedy v. City of Ridgefield, et al.*, 411 F.3d 1134 (9th Cir. 2006), held that a verbal promise by a state official to a victim that he would give the victim advance notice before contacting shooter about the victim's child molestation allegations against shooter, but failed to do so, and verbally assuring her that police would patrol the neighborhood after officer's contact, constituted affirmative state action. "Interpreting the facts in a light most favorable to Plaintiff, we conclude that Shields did in fact *augment* the danger Plaintiff and her husband faced and acted with deliberate indifference to a known or obvious danger." *Id. Kennedy at 1142-1143. The officer in Kennedy, like in the instant case, affirmatively acted through his words and presence which were sufficient to constitute affirmative state action.*

The police officers are also factually and legally mistaken about *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993). The respondent officers incorrectly state that in *Dwares* the "officers were directly liable for the *First* Amendment violation." *Res. p. 17.* Rather, *Dwares* was a Fourteenth Amendment substantive due process claim in the context § 1983 – aiding &

abetting and conspiracy. The Second Circuit held that New York City police officers *verbally* told "skinheads" that they would not interfere if "skinheads" beat up demonstrators burning a flag as long as it did not get out of control, such words constituted state action. There is clearly a need to resolve the conflict among the Federal Circuits over whether words and presence constitute state action.

B. Petitioner did not present a failure to protect claim.

The focus is affirmative state action because the conflict is the lower court's legal decision – **"[B]ecause Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law."** *App.* 19-20. The definition of an "affirmative state action" under the state created danger doctrine cannot be any different than the very meaning of the words "under color of law" contained in § 1983. *Consistent with Deshaney the officers' criminal conduct is the basis to make out a Fourteenth Amendment substantive due process claim.* This Court has held that if state officer acted 'under color of' his legal authority, he could be sued under § 1983 even if his acts were unlawful under state law. *United States v. Classic*, 313 U.S. 919 (1941) that "misuse of power, possessed by virtue of state law, is action taken 'under color of state law.' 365 U.S. at 184. The officers' misplaced contention that "there was not intent or agreement to injure another" is irrelevant because § 1983 and the Fourteenth Amendment do not have an element of intent. *Res. p. 12 n.4. Parratt v. Taylor*, 421 U.S. 457 (1981). There is no basis for a legal distinction between state action 'under color of' law and state action in the state created danger doctrine. *Res. p. 11.* The Federal Circuits need clarification from this court whether the state created danger doctrine spawned post-*Deshaney* permissibly limits the form of state action. Did this court intend or anticipate that *Deshaney* would spawn the state created danger doctrine to be used as shield of absolute immunity to criminal police conduct? In effect the post-*Deshaney* state created danger doctrine abrogates the federal common law and circumvents § 1983. Indeed, if the County social worker in *Deshaney* had been present and verbally encouraged and facilitated poor Joshua's beatings by his father, the *Deshaney* court would not have ruled there was

no "state action" present. This begs the question, are words and presence of police officers facilitating and encouraging illegal drag racing resulting in death still actionable after *Deshaney* under the Fourteenth Amendment through § 1983.

C. Qualified immunity to deadly crimes must fail.

The Sixth Circuit state created danger doctrine impermissibly provided absolute immunity. Police officers incorrectly suggest the "state created danger doctrine" is an instrument of qualified immunity. The officers do not cite any authority that *Deshaney*, *supra*, *authorized the* use of judicial doctrines to provide ***absolute*** immunity. The officers' qualified immunity defense fails because the officers' criminal conduct is so obviously improper that no reasonable officer would expect to be shielded by qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The reviewing court must consider whether a "reasonable officer" would recognize that his or her conduct violates that right under the circumstances faced, and in light of the law that existed at the time. *Saucier v. Katz*, 533 U.S. 194 at 202 (2001). Further, the officers' overlook the undisputable and well established principle that the Constitution protects the citizens liberty interest in his or her life and bodily security. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 344 (1990). *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (paddling student); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ("[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."); *Nishiyama v. Dickson County*, 814 F.2d 277, 280 (6th Cir. 1987) (*en banc*). The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, Section 1. The officers are equally uninformed of the fact that this Court stated "We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental

procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id. County of Sacramento v. Lewis* at 845-46 (1998). The officers do not provide any basis to entitle them to qualified immunity since their conduct was not "objectively reasonable." *See Wilson v. Layne*, 526 U.S. 603, 614 (1999) (*citing Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A peace officer loses qualified immunity when the unlawfulness was "apparent," *Anderson v. Creighton*, 107 S.Ct. at 3039, and when there was not a "legitimate question" as to the lawfulness of the conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985). ***Indeed, the Respondent police officers cannot show any authority under state law, state custom, or state usage to do what they did.*** *Qualified immunity fails.*

D. Respondents' res judicata failed below.

Contrary to the officers' assertion the lower courts rejected *res judicata* because the Michigan Courts authorized the plaintiffs' right to proceed on her federal claim in federal court:

> ***"And, the circuit court's final order was given with the understanding that it reserved adjudication of damages for the pending federal district court claims against defendants." Res. App. 33a p. 2.***

The basis for the Michigan Court of Appeals statement is the officers' agreement placed on the record, in open court, to allow the Petitioner to split her federal claims. *Ct. App. JA 1263.* In fact, in *Pierson Sand and Gravel Inc. v. Keeler Brass Company*, 460 Mich. 372, 596 N.W.2d 153 (1999), the Michigan Supreme Court has specifically adopted the Statement of Judgments to res judicata found in the Second Restatement of Judgments. § 26(1)(a) and (b) provide:

> "(a) *The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or*
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action."

Federal Courts have also adopted the restatement (Second) of judgments, where the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." *Calderon Rosado v. General Electric Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986) (*quoting* Restatement (Second) of Judgments 26(1)(a)). Thus, the federal claims are not precluded by the doctrine of res judicata.

IV. Respondents "Direct Injury" theory does not exist in the entire federal system.

The officers erroneously assert that the petitioner is now claiming a "direct injury theory." Contrary to officers' assertion the Petitioner argued *County of Sacramento v. Lewis*, 523 U.S. 83 (1998), below and cited the district court's finding of 'egregious' police misconduct. *Ct. App. Appellant's Brief p. 25.* **A "direct injury theory" does not exist in the entire federal system.** *Lewis* did not create a "direct injury theory" cause of action. The true teaching of *Lewis*, is the constitutional threshold conduct necessary in the context of a lawful police chase was "egregious" or "conscience shocking conduct." *Lewis* at 846. Indeed, the requisite level of culpability for a substantive due process violation under Fourteenth Amendment was found in favor of the petitioner by the District Court below – ***"[t]he alleged conduct of the officers that fateful evening is egregious."*** *Pet. App. 62.* The Sixth circuit discarded the finding of the district court and used a dubiously unrecognized standard of culpability, namely, to make **"a devil[ ] sick of sin" (Jones at 688, citing Wilfred Owen, Dulce Et Decorum Est (1918))**. *The Sixth Circuit would absurdly impanel a "devilish" judge and jury to sit in judgment of a constitutional tort.* ***This case, of course, is not a high speed chase and the Respondent police officers were not doing their job, pursuing criminals or standing by doing nothing.*** (emphasis added). Although police officers committing crimes is first impression, the conduct of the police officers' leaps across the Constitutional threshold for culpable conduct. **Pet. App. 5. Further, *Lewis* does not condone any kind of criminal conduct of government officials.** Of course, police officers facilitating and encouraging the commission of crimes is conscience shocking or egregious.

V. Respondents fail to address the assumption of risk defense in the context of a § 1983 claim.

The officers do not address this issue of first impression applied by the Sixth Circuit in this case. This Court has refused the application of the assumption of risk defense to federal statutes like § 1983 that were enacted to protect People. (Boiler Inspection Act – 45 U.S.C.S. §§ 22-34). *Great N.R. Co. v. Donaldson*, 246 U.S. 121, 38 S.Ct. 230 (1918). (Hours of Service Act – 45 U.S.C.S. § 61 et seq.) *Baltimore & O.R. Co. v. Wilson*, 242 U.S. 295 (1916); (FELA Act) *Union P.R. Co. v. Huxoll*, 245 U.S. 535, 38 S.Ct. 187 (1918); (Safety Appliance Act – 45 U.S.C.S. §§ 1-16) *Minneapolis v. Goneau*, 269 U.S. 406 (1926); Maritime law by 45 U.S.C.S. § 54; *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, *cert. den.*, 414 U.S. 822 (1973). This court is called upon to decide this issue of first impression in the context of the civil rights statute § 1983.

CONCLUSION

The Court should grant the petition for a writ of certiorari to settle the dispute among the Federal Circuits and decide issues of first impression, or preemptorily reverse the inconsistent published decision of the Sixth Circuit, or alternatively hold this Petition pending the Sixth Circuit decision in the case of *Ricks* and *Draw* (Case #06-1959).

Respectfully submitted,

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